Finding a Cause of Action for Wrongful Death in the Warsaw Convention: *Benjamins v. British European Airways*

I. INTRODUCTION

The United States Court of Appeals for the Second Circuit decided in *Benjamins v. British European Airways*[1] that article 17 of the Warsaw Convention[2] is self-executing. That is, the treaty alone, without additional legislative action, now creates a cause of action for wrongful death.

The facts of the case are simple; on June 18, 1972, an airplane designed and manufactured by Hawker-Siddely Aviation, Ltd. and owned and operated by British European Airways departed for Brussels from London's Heathrow Airport. Soon thereafter, the plane crashed into a field, killing all 112 passengers.

Abraham Benjamins, the spouse of one of the passengers, brought suit for wrongful death and baggage loss in the Eastern District of New York as representative of his wife's estate. Plaintiff was a Dutch citizen permanently residing in California. Defendants were British corporations with their principal places of business in the United Kingdom. The ticket on which the decedent was traveling had been purchased in Los Angeles.

The original complaint alleged only diversity of citizenship as grounds for federal jurisdiction;[3] because Benjamins, a resident alien, could not be diverse from an alien corporation,[4] the complaint was dismissed. Benjamins' suit reached the Court of Appeals for the Second Circuit after the district court, in an unreported decision, dismissed an amended complaint asserting federal question jurisdiction.[5] The Second Circuit

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1. 572 F.2d 913 (2d Cir. 1978).

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (concluded October 12, 1929; adhered to by United States June 27, 1934) [hereinafter cited as Warsaw Convention].

3. 28 U.S.C. § 1332(a) (1976) provides that:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;
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> (2) citizens of a State and citizens or subjects of a foreign state;
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> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
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> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

4. "A foreign-born resident, who has not been naturalized according to the acts of congress, is not a 'citizen' of the United States or of a state, within the definition given by the fourteenth amendment to the constitution, but remains a foreign subject or citizen." City of Minneapolis v. Reum, 56 F. 576, 581 (8th Cir. 1893) (citing Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838)). Because neither party was a "citizen," there was no diversity.

5. 28 U.S.C. § 1331 (1976) provides in relevant part: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000,

expressed approval of the district court's determination that plaintiff could not successfully invoke the Alien Tort Claims Act,[6] but reversed on the ground that because the Warsaw Convention created a cause of action for wrongful death, plaintiff's cause of action arose under a treaty of the United States. In support of its decision to reverse, the court concentrated on the minutes and documents of the meetings that led to the adoption of the Convention in 1929, the official French text of the treaty as well as the unofficial English translation, and the interpretations adopted by other signatory states. These considerations, the court asserted, proved that the signatories intended to create a right to sue for wrongful death. The court further concluded that "the desirability of uniformity in international air law can best be recognized by holding that the Convention . . . is also the universal source of a right of action," and that the ability of the federal courts to consolidate suits for the purposes of pretrial proceedings[7] "makes federal jurisdiction peculiarly appropriate in large air crash cases."[8]

The *Benjamins* opinion is weak because it does not support its position any better than the cases it overruled supported theirs[9] and incomplete because it neither fully applies the traditionally enunciated test of whether the Convention is self-executing[10] nor explains the practical considerations that entered into the decision.[11] This Case Comment explores each of these areas.

II. BACKGROUND

A. *The Warsaw Convention*

The Warsaw Convention was concluded on October 12, 1929. The scope of the Convention is limited by the terms of its first article to "international transportation," defined to include flights between: (1) two or more signatory states; and (2) points within a single signatory state if there is an agreed stopping place outside that state.[12] Whether the contract is for international transportation is determined by reference to the ticket or, in the case of goods shipped, to the air waybill, which fixes the nature of the transportation as domestic or international the moment it is issued.[13]

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exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . . ."

6. 28 U.S.C. § 1350 (1976) provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Warsaw Convention does not prohibit international aviation accidents, but rather provides at least some of the rules for compensating the victims.

7. 28 U.S.C. § 1407 (1976) creates the Judicial Panel on Multi-District Litigation to preside over consolidated pretrial proceedings.

8. 572 F.2d 913, 919 (1978).

9. *See* notes 52-56 and accompanying text *infra*.

10. *See* notes 60-100 and accompanying text *infra*.

11. *See* notes 101-26 and accompanying text *infra*.

12. Warsaw Convention, *supra* note 2, art. 1(2).

13. *Id.*

Thus, an air carrier whose planes never leave the United States is involved in the international transportation of certain passengers when it carries these passengers from Chicago to New York, where they will change planes and continue their journey to London.

An important provision of the Convention placed a monetary limitation on air carrier liability to passengers for personal injury. The limit was set at 125,000 Poincaré francs, or $8,300 per passenger.[14] A carrier could not avail itself of the limitation if the damage was caused by its own willful misconduct[15] or if it had failed to deliver to the passenger a ticket containing the information specified in article 3 of the Convention.[16]

The United States did not participate in any of the preparatory meetings and sent only a observer to the Convention in 1929.[17] It was not until 1934 that President Roosevelt urged adherence to the Convention in the belief that the benefits to be gained by its provisions outweighed the detriment of the liability limitations. The Senate gave its advice and consent on July 17, 1934.[18] Ninety days after depositing its declaration of adherence with the government of Poland on July 31, 1934, the United States was bound by the terms of the Warsaw Convention as by any treaty.[19]

The United States has ratified none of the protocols to the Convention that would have raised the $8,300 limitation on air carrier liability for personal injury.[20] Nevertheless, the effectiveness of the limitation has been severely undermined during the last forty years. Passengers were granted some relief from the $8,300 limitation by court decisions to the effect that the limitations did not apply when the ticket was not delivered far enough in advance of the flight's departure to allow the passenger a reasonable opportunity to protect himself against them,[21] when the ticket was not legible enough to give adequate notification that the Conventional limitations applied,[22] or when the willful misconduct of the airline's

14. *Id.* art. 22. One franc is defined as 65.5 milligrams of gold at the standard of fineness of nine hundred thousandths. *Id.* The purposes of tying the limitation to gold were to ensure uniformity and to protect the real value of the limitation from the "vagaries of currency fluctuation." The possibility that gold might someday be demonitized was not considered. K. ROSENN, LAW AND INFLATION, ch. 7 (to be published in May 1979).

15. Warsaw Convention, *supra* note 2, art. 25.

16. *Id.* art. 3.

17. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 502 (1967).

18. 78 CONG. REC. 11582 (1934).

19. Lowenfeld & Mendelsohn, *supra* note 17, at 502.

20. The Protocol adopted at the Hague in 1955 raised the limit to approximately $16,600; the Protocol adopted at Guatemala City in 1971 raised the limit to 100,000 SDRs (defined at note 130 *infra*) and provided for supplemental plans by individual nations to ensure passengers' lives for an additional $200,000. *See* notes 128-37 and accompanying text *infra*.

21. Mertens v. Flying Tiger Line, Inc., 341 F.2d 851, 856 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

22. Lisi v. Alitalia-Linee Aeree Italiane, S.A., 370 F.2d 508, 514 (2d Cir. 1966), *aff'd mem.*, 390 U.S. 455 (1968).

employees caused the accident.[23] Furthermore, in response to intense pressure from the American government, the affected air carriers agreed in 1966 to absolute liability in damages up to $75,000 for injury to their passengers traveling to, from, or with an agreed stopping place in the United States.[24] As the liability limitations lost their effectiveness through judicial interpretation, the following benefits to passengers, which proponents of adherence to the treaty had argued would offset the low liability limits, either never materialized or declined in importance.

1. *Presumption of Liability*

Article 17 of the Convention[25] shifted the burden of proof on the issue of negligence to the air carrier by creating a rebuttable presumption in favor of the passenger;[26] as the accident record of the airline industry improved, however, *res ipsa liquitur*[27] became readily available to plaintiffs suing air carriers.[28] The differences between *res ipsa* and the Conventional presumption of air carrier liability relate to what the plaintiff must show in order to escape a directed verdict and will rarely affect the result of a case.[29]

2. *Protection From Other, Lower Liability Limits*

Proponents of adherence had argued that the Convention would protect American travelers from the unreasonably low limits on liability that might be in effect at the place of accident.[30] Such protection was fairly important in 1934, because the rule in all American jurisdictions at the time

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23. Berner v. British Commonwealth Pac. Airlines, Ltd., 219 F. Supp. 289, 318 (S.D.N.Y. 1963), *rev'd on other grounds*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

24. The United States applied pressure by denouncing the Convention—that is, by withdrawing from the Convention in accordance with the formal mechanism provided for that purpose by article 39—with the denunciation to take effect six months hence. The *denunciation* was withdrawn by the Government only after the members of the International Air Transport Association agreed to waive the limitations up to $75,000. For a detailed history of these events, see Lowenfeld & Mendelsohn, *supra* note 17, at 546-96.

25. Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3000, 3018 (1929).

26. Letter from Secretary of State Hull to President Roosevelt, SENATE COMM. ON FOREIGN RELATIONS, S. EXEC. DOC. No. G, 73d Cong., 2d Sess. 3-4 (1934), *reprinted in* [1934] U.S. AV. REP. 240 [hereinafter cited as Hull-Roosevelt letter].

27. Under the doctrine of *res ipsa loquitur* there arises at least a permissible inference of defendant's negligence if plaintiff's injury is occasioned by "(1) [an] event . . . of a kind which ordinarily does not occur in the absence of someone's negligence; (2) . . . caused by an agency or instrumentality within the exclusive control of defendant; (3) . . . [and not] due to any voluntary action or contribution on the part of the plaintiff." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 214 (4th ed. 1971).

28. Lowenfeld & Mendelsohn, *supra* note 17, at 521.

29. *Id.*

30. *Id.* at 527.

was lex loci delicti; that is, the cause of action was created and the damages determined by the law of the place where the fatal accident occurred.[31]

The effect of lex loci has been severely undercut by a number of cases, beginning with *Kilberg v. Northwest Airlines, Inc.*[32] That case arose out of the crash of an airliner in Massachusetts. Had the court applied the doctrine of lex loci, plaintiff's recovery would have been limited to $15,000 by Massachusetts statute;[33] the court held, however, that although the cause of action on which plaintiff was suing was created by the laws of Massachusetts, the measure of damages would be determined by the laws of New York, which was the forum state and plaintiff's place of residence.[34] The *Kilberg* rule has been adopted by the authors of the Restatement:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue [*e.g.*, damages], some other state has a more significant relationship . . . to the occurrence and the parties, *in which event the local law of the other state will be applied.*[35]

Some state courts have adopted a similar rule that turns on "governmental interest" rather than "substantial relationship."[36] Both of these terms have remained only vaguely defined, and seem calculated to give the courts maximum discretion in resolving conflict of laws issues.[37] It is unlikely that an American court would find that a foreign country with outrageously low liability limitation has either a more substantial relationship to, or a greater governmental interest in an American plaintiff and the measure of damages he receives in a wrongful death action.

3. *Jurisdiction*

Article 28 of the Convention supposedly eliminated the American wrongful death plaintiff's problem of establishing venue in an American court,[38] at least in the typical case in which the passenger bought a round-

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31. J. BEALE, THE CONFLICT OF LAWS §§ 412.1-.2 (1935).

32. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

33. *Id.* at 39, 172 N.E.2d at 527, 211 N.Y.S.2d at 135; MASS. GEN. LAWS. ANN. ch. 229, § 2 (1958).

34. 9 N.Y.2d at 42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137-38.

35. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (1971) (emphasis added).

36. *See, e.g.*, Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

37. For an excellent discussion of the law of conflicts, see Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27 (1976). In analyzing a number of New York cases, Professor Powers states: "To the extent that the identification of policies behind various rules become indeterminable and subject to manipulation, the method itself becomes inconclusive and subject to manipulation." *Id.* at 41.

38. Under art. 28, suit may be brought in any of four countries: (1) the domicile of the carrier; (2) the carrier's principal place of business; (3) the place of business at which the ticket was purchased (held in Eck v. United Arab Airlines, 360 F.2d 804, 813 (2d Cir. 1966), to include the location of the ticket office of another airline selling the defendant's tickets, even though the defendant had no offices in the country); or (4) the place of destination.

trip ticket at his own domicile.[39] This provision has not proved particularly helpful to plaintiffs. Even when the United States satisfies the requirements of article 28, no American court is compelled by the Convention to exercise jurisdiction.[40] Thus, the plaintiff is forced to establish that the court of his choice has personal jurisdiction, and must still find and serve the defendant, even if the defendant is "doing business" within the forum.[41] If the Convention gives a court subject matter jurisdiction, it is because some article other than article 28 creates a cause of action.

4. *Inducement to Settle Out of Court*

The $8,300 limitation on personal injury liability was expected to induce parties to settle their differences out of court.[42] Apparently, it was expected that plaintiffs would realize they were bound by the limitations, that air carriers would realize that $8,300 was as little as they were likely to be assessed in damages, and that both would want to avoid the expense of litigation. This benefit disappeared, if it ever existed, as courts began to recognize exceptions to the liability limitations[43] and plaintiffs discovered that the limitations did not apply to airplane manufacturers.[44]

5. *A Conventional Cause of Action*

Another anticipated benefit was the creation of a federal cause of action for the wrongful death of a passenger engaged in international transportation.[45] Although the Court of Appeals for the First Circuit had earlier held that articles 18[46] and 30(3)[47] combine to create a federal cause of action for *baggage loss*,[48] the *Benjamins* holding that the Convention also creates a right to sue for wrongful death finds little support in the decisions of other courts.

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39. Lowenfeld & Mendelsohn, *supra* note 17, at 522-23. In the atypical case in which an American has bought a ticket in France for a Paris-New York-Paris trip, the passenger or his personal representative may not bring suit in an American court because the Convention considers Paris to be both the place of departure and the destination.

40. Smith v. Canadian Pac. Airways, Ltd., 452 F.2d 798, 801 (2d Cir. 1971).

41. Lowenfeld & Mendelsohn, *supra* note 17, at 522-26.

42. Hull-Roosevelt letter, *supra* note 26.

43. *See* notes 14-16 and accompanying text *supra*.

44. *Aviation Protocols: Hearings Before the Senate Committee on Foreign Relations*, 95th Cong., 1st Sess. 105 (1977) (statement of John Martin) [hereinafter cited as *Hearings*].

45. Lowenfeld & Mendelsohn, *supra* note 17, at 517. The source of this new cause of action was to be art. 17 (text quoted at note 25 *supra*).

46. Warsaw Convention, *supra* note 2, art. 18, provides in part: "(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air."

47. *Id.* art. 30 provides that with respect to goods or baggage, a "passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier . . . ."

48. Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964).

B. *The Cases*

The first American court to consider whether the Warsaw Convention created a cause of action for wrongful death was the District Court for the Southern District of New York in *Choy v. Pan American Airways, Inc.*[49] *Choy* was an action brought for the death of a passenger killed when defendant's seaplane crashed into the Pacific Ocean on an international flight. Plaintiffs were permitted to bring suit on the basis of the Death on the High Seas Act,[50] but the court rejected their allegation of subject matter jurisdiction under the Warsaw Convention, holding that the Convention created no cause of action for wrongful death. The same result was reached two years later by the New York Court of Appeals in *Wyman v. Pan American Airways, Inc.*[51]

In *Noel v. Linea Aeropostal Venezolana*[52] the Court of Appeals for the Second Circuit, which later decided *Benjamins*, squarely held that the Warsaw Convention created no cause of action for the purposes of domestic law. The court relied on its earlier decision, *Komlos v. Compagnie Nationale Air France*,[53] in which defendant airline had argued that the Convention created a cause of action to the exclusion of all others, thus barring plaintiff's invocation of the New York wrongful death statute. Although it could have avoided the issue by declaring that any Conventional cause of action was not exclusive,[54] the *Komlos* trial court held that the Convention created no cause of action.[55] On appeal, the Second Circuit reversed on other grounds, without discussing whether the Warsaw Convention created a right to sue. When *Noel* came up on appeal four years later, the Second Circuit interpreted this silence as implied affirmation of the *Komlos* trial court's resolution of the issue and held, without further discussion, that the Convention created no new substantive law. Other courts quickly adopted the *Noel* ruling.[56]

If, in light of this history, the Second Circuit overruled *Noel* and *Komlos* for the reasons stated in *Benjamins*,[57] it would be very surprising. The remainder of this Case Comment explores the traditional and

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49. [1941] Am. Mar. Cas. 483, 1 Av. Cas. 946 (S.D.N.Y. 1941).

50. 46 U.S.C. §§ 761-768 (1970), which provides in part: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore . . . the personal representative of the decedent may maintain a suit for damages . . . in admiralty . . . ."

51. 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd mem.*, 267 App. Div. 947, 48 N.Y.S.2d 459, *aff'd mem.*, 293 N.Y. 878, 59 N.E.2d 785, 48 N.Y.S.2d 459, *cert. denied*, 324 U.S. 882 (1945).

52. 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

53. 209 F.2d 436 (2d Cir. 1953).

54. Calkins, *The Cause of Action Under the Warsaw Convention, Part II*, 26 J. AIR. L. & COM. 323, 328 (1959).

55. 111 F. Supp. 393, 401 (S.D.N.Y. 1952), *rev'd*, 209 F.2d 436 (2d Cir. 1953).

56. Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977); Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965).

57. *See* notes 6-8 and accompanying text *supra*.

practical considerations that may have contributed to the *Benjamins* decision and the probable effect of the decision on American law.

III. ANALYSIS OF THE *Benjamins* DECISION

Because the United States has not implemented the Warsaw Convention by statute and there has generally been no common-law cause of action for wrongful death,[58] Warsaw plaintiffs unable to establish diversity jurisdiction[59] but wishing to bring suit in federal court have forced the federal courts to consider whether the Convention itself creates a cause of action, that is, whether article 17 of the Convention is self-executing.

A. *Is Article 17 of the Warsaw Convention Self-Executing? The Traditional Analysis*

Under the approach traditionally enunciated by the courts, a treaty is self-executing whenever its provisions prescribe a rule by which rights of the private citizen may be determined.[60] More specifically, a treaty may be considered self-executing if it was the intent of the parties that no implementing legislation be required to carry out the purpose of the agreement, and if its provisions can be given effect without further legislation.[61]

1. *Did the Signatories of the Convention Intend to Create a Cause of Action?*

The *Benjamins* court correctly suggested that the purpose of the Convention was to establish international uniformity of private air law.[62] That much is evident from the official title of the treaty: Convention for the Unification of Certain Rules Relating to International Transportation by Air. Nevertheless it is not as clear as the court assumed that this uniformity was to be furthered by the creation of a Conventional cause of action for wrongful death.

There is a finite number of sources upon which writers can draw to determine the intentions of the Convention's signatories with respect to a cause of action for wrongful death. Courts and commentators struggling with this issue have buttressed their diverse points of view by analyzing various documents. These include the Convention itself,[63] Secretary of

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58. Moragne v. States Marine Lines, 398 U.S. 375, 384 (1970).

59. *See* note 3 *supra*.

60. Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

61. Comment, *Criteria for Self-Executing Treaties*, U. ILL. L. F. 238, 239-40 (1968).

62. 572 F.2d at 917.

63. *E.g.*, Reed v. Wiser, 555 F.2d 1079, 1092 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); Lowenfeld & Mendelsohn, *supra* note 17, at 517.

State Hull's letter transmitting the Convention to President Roosevelt,[64] the minutes of the Convention,[65] earlier drafts of the Convention and the meetings at which they were presented,[66] the French text of the treaty,[67] and the effect of the so-called Montreal Agreement.[68] Because another review of these sources would add little to the resolution of the issue of self-execution, none will be attempted here. In view of the support available for each position, no argument—including that of the court in *Benjamins*[69]—is particularly compelling.

What the *Benjamins* court found to be "[m]ore compelling" than the minutes and documents of the meetings or its analysis of the Convention text was "the evidence of how other signatories [specifically, the United Kingdom and Canada] interpreted its provisions."[70] The structure of the opinion[71] implies that the conclusion "compelled" by this evidence is that the Convention itself created a cause of action. In fact, there has been no treatment of the issue by the Convention's most important signatories because their courts have alternative means of asserting jurisdiction. The United Kingdom's Carriage by Air Act of 1932,[72] which incorporated the Warsaw Convention by reference and excluded other bases for international air carrier liability for wrongful death, eliminated the need to determine whether the Convention alone created a right to sue in British courts.[73] Similar statutes produced similar results in both Canada[74] and Australia,[75] and the possibility of a Conventional cause of action has never been considered in France, where the contract of carriage can provide a right to bring suit for any cause, "be it wrongful death, personal injury, delay, or damage to baggage or cargo."[76]

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64. *E.g.*, Benjamins v. British European Airways, 572 F.2d 913, 920 (1978) (Van Graafeiland, J., dissenting).

65. Calkins, *The Cause of Action Under the Warsaw Convention, Part I*, 26 J. AIR. L. & COM. 217, 228-34 (1959).

66. *Id.* at 222-23.

67. Note, *Warsaw Convention—Limited Liability—Voyage Charter*, 34 J. AIR L. & COM. 643 (1968).

68. Officially named "Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocols." 31 Fed. Reg. 7302 (1966).

69. *Benjamins* relies on the minutes and documents of the meetings leading to the Convention's adoption, and analysis of the text. 572 F.2d at 917-18.

70. 572 F.2d at 918.

71. The preceding quotation is found immediately following a discussion of the text of the Convention and how it "sheds light" on the intended result. 572 F.2d at 918-19.

72. 22 & 23 Geo. 5, c. 36, § 4.

73. G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 228 (1977). Britain's Carriage by Air Act of 1961, 9 & 10 Eliz. 2, c. 27, repeated the 1932 statute and extended the Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93 (better known as Lord Campbell's Act) to fill the void. The change has been of little consequence to litigants because there continues to be a cause of action for wrongful death arising in the course of international travel. G. MILLER, *supra*, at 229.

74. CAN. REV. STAT. c. 14, § 2(5) (1970).

75. 2 ACTS AUSTL. P. 1901-1973, at 643 (1974).

76. G. MILLER, *supra* note 73, at 231.

2. *Does the Warsaw Convention Contain the Necessary Elements of a Cause of Action for Wrongful Death?*

In holding that the Warsaw Convention creates no cause of action for wrongful death, the District Court for the Southern District of New York, in *Choy v. Pan American Airways, Inc.*, stated:

> There is no enabling act vesting the ownership of the cause of action stated by the Warsaw Convention nor even stating who may be thought to be injured by a death and, though the liability stated in Article 17 is part of the treaty which was adopted, we do not understand how it can be defined or enforced without statutory assistance, which it has not as yet received.[77]

It is not evident from the opinion whether the *Choy* court considered article 24 of the Convention[78] in conjunction with article 17. Together these articles are interpreted by some commentators to mean that while the Convention creates a cause of action for wrongful death, the determination of who may bring suit is to be made with reference to national law.[79] Treaties should be construed liberally to accomplish their purposes; therefore, if the parties to the Convention intended to create a cause of action for wrongful death, it is altogether proper to take elements of a cause of action from national law.

On the other hand, at the time *Choy* was decided there was little national law from which to draw the elements of a wrongful death action. Several federal statutes[80] provided exceptions to the common-law doctrine that a private cause of action would not lie for wrongful death, but these statutes were limited in their scope. Furthermore, although the court could have taken the missing elements of a Conventional cause of action from these statutes, it was able to provide plaintiffs with a recovery without overruling ancient common law to create a new cause of action for wrongful death.[81]

In a 1970 case, *Moragne v. States Marine Lines, Inc.*, the United States Supreme Court found a common-law cause of action for wrongful death in admiralty, stating "it is sufficient at this point to conclude . . . that the work of the legislatures has made allowance of recovery for wrongful death the general rule of American law, and its denial the exception."[82] Four years later, the Court reaffirmed its earlier holding and

77. [1941] Am. Mar. Cas. at 487-88, 1 Av. Cas. at 948-49. Although the question whether a treaty contains the necessary elements of a cause of action is part of the traditional approach to determining whether it is self-executing, the *Benjamins* court discussed neither the issue nor *Choy*'s resolution of it.

78. The pertinent part of art. 24 states: "In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.*" (emphasis added).

79. Calkins, *supra* note 65, at 333. *Cf.* Comment, *Air Passenger Deaths*, 41 CORNELL L. Q. 243, 260 (1956) (interpreting arts. 17 & 24 together as indicating conventional reliance on pre existing rights to sue).

80. *E.g.*, Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1970); Jones Act, 46 U.S.C. § 688 (1970); Death on the High Seas Act, 46 U.S.C. § 761 (1970).

81. *See* notes 49-51 and accompanying text *supra*.

82. 398 U.S. 375, 393 (1970).

began to indicate the parties who have the right to sue on the new cause of action and the rules for measuring damages.[83] This willingness to dispense with the old rule, which was recognized as "not founded in good reason" and "contrary to natural equity and general principles of law" when originally adopted by the Supreme Court,[84] seemingly clears the way for developing a national law that would support a Conventional cause of action for wrongful death.

To apply the new-found Conventional cause of action to individual cases, the courts must determine who has the right to sue for wrongful death and the measure of damages they might recover. There are several possible solutions.[85]

First, the courts could adopt the admiralty common-law definitions set out in *Sea-Land Services, Inc. v. Gaudet*,[86] allowing recovery by dependents of the decedent for loss of support, loss of services, loss of society, and damages for funeral expenses,[87] with the adjustments necessary to prevent double recovery when the decedent has previously recovered for his personal injury.[88] This approach would solve the problem of defining the measure of damages, but it fails to provide a definition of "dependents" and thus a determination of who may bring suit.

Second, the courts could look to several federal statutes for the necessary elements. The Death on the High Seas Act[89] provides an admiralty cause of action for wrongful death of any person beyond a marine league (three miles) from shore. The right to sue is vested in "the decedent's wife, husband, parent, child or dependent relative,"[90] and the measure of damage is "pecuniary loss."[91]

The Federal Employers' Liability Act[92] and the Jones Act[93] create causes of action for the deaths of railroad employees and seamen, respectively, killed in the course of their employment. The right to sue vests first in decedent's surviving children and spouse, if any, then in decedent's parents or next of kin.

It is also possible for the courts to avoid answering these questions

83. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974).

84. The Harrisburg, 119 U.S. 199, 213 (1886).

85. It is not the purpose of this section to argue the benefits and drawbacks of any of these solutions, but rather to show that there is national law on which the courts could draw to fill the holes left in the Conventional cause of action by the terms of the treaty.

86. 414 U.S. 573 (1974).

87. *Id.* at 584.

88. *Id.* at 592. The danger of double recovery arises when the decedent has previously recovered for loss of future earnings and the plaintiffs are seeking to recover for loss of support.

89. 46 U.S.C. §§ 761-768 (1970).

90. *Id.* § 761.

91. *Id.* § 762. By judicial gloss, "pecuniary loss" has developed to include loss of support and loss of services, Douglas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971), but not loss of society. Middleton v. Luckenbach S.S. Co., 70 F.2d 326 (2d Cir. 1934). Compensability of funeral expenses is a matter of debate. *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 591 (1974).

92. 45 U.S.C. §§ 51-60 (1970).

93. 46 U.S.C. § 688 (1970).

altogether. Under this approach, the Conventional cause of action would be used solely for the purpose of establishing the subject matter jurisdiction of the federal courts, which would also take jurisdiction over pendent state claims for wrongful death. The court would then decide the case on the basis of the state claim without reaching the Conventional cause of action. Leaving aside the problems of establishing the presence of a substantial federal question,[94] this solution is not very satisfactory because it leaves major conflict of laws problems that must be resolved by the courts.[95] Furthermore, it does not create the uniformity of damage awards considered so desirable by a number of commentators;[96] the personal representatives of two hypothetical passengers sitting side by side when the airplane crashed might receive different recoveries solely because they are residents of different states. On the other hand, another sort of uniformity would be achieved: the recoveries generated by the deaths of individuals identical in every way, except that one died in a car accident and the other in an air crash, would also be identical.

The first of the solutions mentioned above, analogy to the common law of admiralty created in *Moragne* and *Gaudet*, is the approach most likely to win approval of the courts. In *Gaudet*, the Supreme Court expressly refused to draw analogies to federal wrongful death statutes, preferring to adopt the more progressive decisions of state courts that had allowed damages not considered to be "pecuniary loss."[97] The determination of who may bring suit and their rights *inter se* would be no more difficult in the context of the Warsaw Convention than it will be under *Moragne*.

Another question that has been raised by courts and commentators is whether the Conventional cause of action would sound in tort or contract.[98] Very few modern commentators have been interested in categorizing the various causes of action as "tort" or "contract,"[99] and for good reason. Once the right is created and vested in particular persons, and the measure of damages defined, the particular form of action into which it would have fit is irrelevant.[100]

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94. Hagans v. Lavine, 415 U.S. 528, 536 (1974).

95. *See* notes 119-21 and accompanying text *infra*.

96. *See, e.g.*, Fridman, *The Interaction of Tort and Contract*, 93 L. Q. REV. 422 (1973); Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U.L. REV. 299 (1967); Note, *Aircraft Disaster Litigation*, 51 N.Y.U.L. REV. 231 (1976).

97. 414 U.S. at 588.

98. *See, e.g.*, Salamon v. K.L.M., 107 N.Y.S.2d 768 (Sup. Ct. 1951), *aff'd mem.*, 281 App. Div. 987, 120 N.Y.S.2d 917 (1953); Calkins, *supra* note 65, at 228.

99. *But see* Prosser, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS 380-452 (1953).

100. Regardless how the Conventional cause of action is characterized, "[t]he right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped." Warsaw Convention, *supra* note 2, art. 29(1).

B. *Is Article 17 of the Warsaw Convention Self-Executing? Some Practical Considerations*

A comparison of the cases deciding whether particular treaties are self-executing with the texts and minutes of the treaties themselves reveals that the courts have considered more than the traditional questions regarding the intent of the parties and the elements of a cause of action.[101] It would seem that the courts are especially free to consider the practical consequences of their decisions when, as with the Warsaw Convention, the traditional analysis is inconclusive.

Three groups stand to be affected by the *Benjamins* holding that the Warsaw Convention creates a cause of action for wrongful death: the courts, the attorneys, and the parties. Each is discussed below.

1. *The Effect of* Benjamins *on the Courts*

Benjamins v. British European Airways may have been decided with an eye toward judicial economy.[102] A Conventional cause of action for wrongful death would allow the consolidation of all suits properly brought in American courts by Warsaw plaintiffs on the basis of the same international air disaster and might reduce the complexity of air crash litigation.

If a Warsaw plaintiff brings suit in federal court, his wrongful death action may be consolidated with other suits arising from the same disaster for the purpose of pretrial proceedings[103] and for the trial itself.[104] Federal subject matter jurisdiction may be established on a number of grounds other than a Conventional cause of action.

First, diversity jurisdiction[105] is available if the citizenship of the plaintiff is diverse from the citizenship or principal place of business of the defendants,[106] who will often include the manufacturer of the airplane that crashed, the manufacturer of the component of the airplane that allegedly failed and caused the crash, the employees of the air carrier, and the air carrier itself.[107]

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101. *See* Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976) (holding that U.N. Sec. Council Resolution 301(f), calling upon all states "to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory . . . " was not self-executing); *see also, e.g.*, Ortman v. Stanray Corp., 371 F.2d 154, 157 (7th Cir. 1967) (holding that the International Convention for the Protection of Industrial Property of March 20, 1883, art. 2(1), which states that "[n]ationals of each of the countries of the Union shall, in all other countries of the Union . . . enjoy the advantages that their respective laws now grant to their own nationals, without any prejudice to the rights specifically provided by the present convention" was not self-executing).

102. 572 F.2d at 919.

103. *See* note 7 *supra.*

104. 28 U.S.C. § 1404 (1976).

105. *See* note 3 *supra.*

106. The plaintiff's citizenship must be diverse from the citizenship of every defendant. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

107. *Hearings, supra* note 44, at 105 (statement of John Martin).

Second, the federal courts have original jurisdiction over all claims against the United States Government,[108] including those invoking the Federal Tort Claims Act.[109] Thus, plaintiffs may enter federal court by asserting the United States was at fault for its wrongful or nonexistent approval, certification, or inspection of the ill-fated airplane,[110] or for the wrongful acts of American air traffic controllers.[111]

Third, the federal courts may have original jurisdiction under the Federal Aviation Act of 1958.[112] This statute has been held to create some private causes of action,[113] but it is unclear whether Warsaw cases are within its scope.

Fourth, if the accident giving rise to the suit was a crash into navigable waters within three miles of shore, the federal common-law cause of action for wrongful death, created by *Moragne v. States Marine Lines, Inc.*,[114] would provide federal admiralty jurisdiction. Fifth, if the accident occurred on or over the high seas, the Death on the High Seas Act[115] would provide a remedy in admiralty court.

In spite of the foregoing, there is a group of plaintiffs who cannot bring suit in federal court in the absence of a Conventional cause of action, and would therefore be forced to bring suit separately. *Benjamins* provides a perfect example of this type of plaintiff: Benjamins brought suit against nondiverse defendants for the wrongful death of a passenger killed while riding in a plane over foreign territory on a ticket that does not even mention the United States, the plane having been manufactured and owned by foreign corporations. While obviously the number of such plaintiffs is exceedingly small, one plaintiff forced to bring suit separately from a consolidated action of five hundred will double the number of trials arising from the same accident.

This aspect of the Conventional cause of action could take on greater significance if the present trend toward limiting federal diversity jurisdiction continues.[116] This new-found cause of action will allow consolidation in the federal courts of large and increasing numbers of suits that might not otherwise have been within their jurisdiction.

A more immediate consideration is the possibility of reducing the complexity of litigation arising from international air crash disasters by way of the Conventional cause of action. *In re Paris Air Crash of March 3, 1974*[117] illustrates how staggeringly complex this litigation can be. The case

108. 28 U.S.C. § 1346 (1976).
109. *Id.* §§ 2671-2680.
110. In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 737 (C.D. Cal. 1974).
111. *Hearings, supra* note 44, at 105 (statement of John Martin).
112. 49 U.S.C. § 1506 (1970).
113. Gabel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Cal. 1972).
114. 398 U.S. 375 (1970).
115. 46 U.S.C. §§ 761-768 (1970).
116. *See* 1 MOORE'S FEDERAL PRACTICE ¶0.71 [3.-2], at 701.29-.30 (2d ed. 1978).
117. 399 F. Supp. 732 (C.D. Cal. 1974).

arose from the crash of a DC-10 airliner manufactured by McDonnell Douglas Corporation and operated by Turkish Air Lines. Some 1000 dependants of 337 decedents from twenty-four countries and at least twelve states brought 203 suits in federal district court; of these, 191 suits were originally filed in the Central District of California, and ten were transferred to that court by the Judicial Panel on Multi-District Litigation. Each of these suits included cross-claims, counterclaims and third party claims; "[a]ll the cross-claims [had] numerous special defenses, one as many as 20."[118]

The conflict of laws problem alone should have been enough to make Judge Hall wish he had been on the ill-fated airplane along with plaintiffs' decedents. Turkish Air Lines was sued for wrongful death; McDonnell Douglas and General Dynamics were sued on the theories of strict products liability, contribution, and indemnity; the United States Government was sued under the Federal Tort Claims Act.[119] Each of these theories and causes of action serves a different policy; thus, the issue of what jurisdiction's law should be applied had to be resolved separately for each of them.

And the case could have been even more complex. Before the court ruled on a variety of thorny issues that had been raised,[120] defendants McDonnell Douglas, General Dynamics, and Turkish Air Lines agreed among themselves to a formula for "sharing all the damages so that the matter of liability need not be litigated, but that all claims would be disposed of by settlement, or trial on the issue of damages."[121]

A Conventional cause of action will simplify international air crash litigation to the extent it eliminates conflicts over what laws give plaintiffs the right to sue the airline and the rules for determining the measure of damages; the step is nevertheless a small one. The Warsaw Convention does not affect causes of action against, or the liability of, aircraft manufacturers or the United States Government.[122] Nor does the Convention affect the issues of contribution and indemnity between the airline and manufacturers. Furthermore, unless the Conventional cause of action is held to preempt other grounds for any suit within its scope, the courts will still be forced to deal with conflict of laws questions merely to resolve a wrongful death suit against an airline. Thus, any argument that a Conventional cause of action will greatly reduce the complexity of litigation of suits arising from international air crash disasters is misguided.

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118. *Id.* at 736.

119. 28 U.S.C. §§ 2671-2680 (1976).

120. Issues unresolved by the court included applicability of the California Consumer Credit Act, a motion for summary judgment against plaintiff's claims for punitive damages, and the choice of law on liability. 399 F. Supp. at 733, 737.

121. *Id.* at 737.

122. *Hearings, supra* note 44, at 105 (Statement of John Martin).

2. *The Effect of* Benjamins *on Plaintiffs' Attorneys*

Warsaw litigation is a complicated process that relatively few law firms appear willing to attempt.[123] Although damages must be proved for each plaintiff individually, a firm may spend significantly less time earning its contingent fee if it can consolidate the trials of issues common to all of its plaintiffs. The firm may profit further by consolidating all of its suits with those being guided through the federal courts by other firms, and by whatever reduction in complexity *Benjamins* provides.

3. *The Effect of* Benjamins *on the Parties to the Litigation*

The effect of *Benjamins v. British European Airways* on the vast majority of plaintiffs seems likely to be slight. Benjamins himself could have brought suit in England[124] or in the state courts of California.[125] Even before the Second Circuit's decision, there was little chance that an individual who had suffered a loss at the hands of an air carrier would have been without a forum in which to seek recovery. It is commonplace that wrongful death recoveries are generally higher in the United States than in any other part of the world and it is true that the Conventional cause of action may provide damages not compensable in suits brought on other grounds;[126] Warsaw recoveries nevertheless remain limited to $75,000. There is no evidence that Warsaw plaintiffs' legal fees will decrease despite the reduced complexity of the Conventional cause of action and the increased efficiency of consolidating suits in federal court when the Convention is the plaintiff's sole claim to federal subject matter jurisdiction. At most, the Convention puts another arrow in the plaintiff's quiver. Defendants will be benefited only to the extent *Benjamins* is their sole basis for removing actions to federal court or consolidating them there.

IV. THE REVISED WARSAW CONVENTION

The Warsaw Convention "is not a treaty that has mouldered on the books."[127] The United States Senate is currently considering three protocols to the Warsaw Convention[128] that, if ratified, will completely replace the older treaty and substantially alter the terms considered by the

123. *See, e.g.*, In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 739 (1975), in which three law firms represented the bulk of the plaintiffs.

124. Carriage by Air Act of 1961, 9 & 10 Eliz. 2, c. 27.

125. *See* CAL. CIV. PROC. CODE § 410.10 (West 1973) and accompanying comments of the Judicial Council, *id.* at 480, which allow California courts to exercise jurisdiction over corporations "doing business" in the state. Selling airline tickets is clearly "doing business." Buckeye Boiler Co. v. Superior Ct., 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

126. This, of course, depends on what injuries the courts deem compensable. *See* notes 85-97 and accompanying text *supra*.

127. Benjamins v. British European Airways, 572 F.2d 913, 920 (1978) (Van Graafeiland, J., dissenting) (citing Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977)).

128. The official titles are: Guatemala City Protocol to Amend the Convention for the

Benjamins court. The Senate hearings[129] have dealt almost exclusively with the higher air carrier liability limits set by the Revised Warsaw Convention,[130] and it is apparent that the liability issue will make or break the revision.

More important to this Case Comment, however, is that the Revised Convention holds the air carrier strictly liable for the death or personal injury of its passengers,[131] and makes the liability limitations "unbreakable" in the sense that the carrier would be within their protection even when a plaintiff could show willful misconduct or inadequate delivery of the required warnings.[132] If the Revised Warsaw Convention is ratified by the Senate, the United States will denounce the original Warsaw Convention in order to leave the country "bound by only the most modern set of rules."[133] Theoretically, this would amount to a repeal of the law on which the *Benjamins* decision is founded. As a practical matter, the Revised Convention provides a stronger basis for finding a cause of action for wrongful death,[134] although giving no better guidance by way of legislative history or its terms than did its predecessor.

Complexity tends to enter air disaster litigation as plaintiffs are required to join as defendants the manufacturers of the airplane and its component parts and the United States Government[135] in order to circumvent liability limitations on the way to full recovery of damages proven. Under the Revised Warsaw Convention, a majority of plaintiffs[136]

Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on September 28, 1929, as amended by the Protocol Done at the Hague on September 28, 1955; Additional Protocol No. 3 to Amend, etc.; and Additional Protocol No. 4 to Amend, etc. [hereinafter collectively cited as Revised Warsaw Convention].

129. *Hearings, supra* note 44.

130. If the Revised Warsaw Convention is ratified by the Senate, the new air carrier liability limitations will be 100,000 Special Drawing Rights (SDRs). The value of the SDR is determined by a weighted average of sixteen currencies, with the weights attributed to each currency broadly proportioned to each country's share of the world's exports. The U.S. dollar accounts for one-third of the SDR's value. K. ROSENN, *supra* note 14. In addition, the 100,000-SDR limitation may in individual countries be effectively increased by $200,000 under Supplemental Compensation Plans, which amount to mandatory insurance programs to be funded by surcharges on the sale prices of international tickets.

131. Article 17(1) of the Revised Warsaw Convention provides:

> The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

Article 21 provides the airline with a second defense: recovery is reduced if decedent's death was due at least in part to his own wrongful acts or omissions.

132. The Revised Convention thus represents a significant departure from the present Convention. *See* notes 14-16 and accompanying text *infra.*

133. *Hearings, supra* note 44, at 7 (statement of Herbert J. Hansel).

134. Moore & Palaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. AIR L. &COM. 3, 31 (1967).

135. *See* notes 120-21 and accompanying text *supra.*

136. The exact percentage is in dispute. A Civil Aeronautics Board study indicating that 80% of all plaintiffs would receive full recoveries under the Revised Convention has come under severe attack. *See Hearings, supra* note 44, at 63-88 (statement of Elias Saad and John Benn).

will be unable to prove damages in excess of the liability limitations. Consolidation would take on increasing importance as the liability limitations become inadequate due to inflation[137] and plaintiffs would be forced to bring other parties, who would remain unaffected by the liability limitations, into the suit in order to recover all of their provable damages.

V. CONCLUSION

The *Benjamins* court could have strengthened its arguments considerably by focusing on the recent shift in judicial attitude toward wrongful death. *Moragne* and *Gaudet* could supply the necessary elements of a cause of action, lacking when *Choy, Komlos*, and *Noel* were decided. The change in attitude is certainly significant enough to justify a change in treatment of the Warsaw Convention.

As a practical matter, *Benjamins* is a step toward easing the burden of Warsaw litigation on the courts. Although it will neither cause the consolidation of all the suits arising from any single air disaster[138] nor significantly reduce the complexity of the litigation, the benefits far outweigh the costs to the litigants.[139] The importance of a Conventional cause of action would in the short run be significantly diminished by Senate ratification of the Revised Warsaw Convention, but would tend to increase as Warsaw litigation once again became more complex.

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137. *Id.*

138. Unless the Conventional cause of action is found to be exclusive, plaintiff may avoid removal from state to federal court under 28 U.S.C. § 1441 (1976) by alleging only the state wrongful death statute as ground for relief. In any event, plaintiffs will still be free to sue in any other country with jurisdiction, and certain passengers on the ill-futed plane will not come within the Warsaw Convention's scope.

139. State court judges obviously have substantial experience in wrongful death cases and are quite capable of handling Warsaw cases. *See In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1974), in which Judge Hall appointed several retired state court judges to make findings regarding plaintiff's damages.